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Court

Original: **English**

No.: **ICC-01/05-01/13**
Date: **31 January 2018**

THE APPEALS CHAMBER

Before: **Judge Silvia Fernández de Gurmendi, Presiding Judge**
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Geoffrey A. Henderson
Judge Piotr Hofmański

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF
THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIMÉ KILOLO MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA WANDU AND NARCISSE ARIDO

With Public Annexes A and B

Public Redacted Version of
"Narcisse Arido's
Document in Support of Appeal Against Sentence Pursuant to Article 81"
(ICC-01/05-01/13-2169-Conf), filed 21 June 2017

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I. INTRODUCTION

1. The Arido Defence respectfully submits this appeal against the Trial Chamber VII's ('Chamber' or 'Trial Chamber') decision pursuant to Article 76 of the Statute ('Sentencing Decision') under Articles 81(1)(b), 81(2)(b), and 83(2) of the Statute.

2. On 19 October 2016, the Chamber rendered its Judgment under Article 74 of the Statute ('Judgment'), convicting Appellant of the offence of corrupting witnesses, in conjunction with Article 25(3)(a), in respect to P-260 (D-2), P-245 (D-3), D-4 and D-6. Appellant was acquitted of Article 70(1) (a) and (b) in respect to the same witnesses.[1] In its document in support of appeal against the Judgment,[2] the Arido Defence requests the Appeals Chamber to set aside and reverse the Chamber's conviction and enter a verdict of acquittal[3] because the legal and factual errors that led to an erroneous conviction were further compounded by violations of fundamental human rights and fair trial protections and this resulted in a mis-trial.

3. On 22 March 2017, the Chamber issued the Sentencing Decision and sentenced the Appellant to 11 months of imprisonment.[4] The Sentencing Decision relied upon testimony that was adduced during a sentencing hearing that fundamentally undermined the elements on which the Appellant's conviction was based. Moreover, the decision contains legal and factual errors that have a material effect upon the Chamber's exercise of discretion. Thus, the Defence respectfully requests that the Appeals Chamber render the sentence of 11 months imposed by the Chamber as null and void, and acquit the Appellant.

4. Prior to the rendering of the Judgment and Sentencing Decision, the Appellant spent 11 months in pre-trial detention. This was under the control of France at the request of the ICC and later at the ICC detention centre. Despite the sentencing already being served, the Appeals Chamber has the legal authority to examine whether the sentence imposed – which has been already served – was correct.

5. A sentence which is imposed based on an erroneous judgment is unlawful, and the reality that this sentence has already been served is a manifest miscarriage of justice which requires a remedy. As a consequence of this, the Defence requests that the Appeals Chamber, based on

[1] ICC-01/05-01/13-1989-Red ('Trial Judgment' or 'Judgment'), para. 871.
[2] ICC-01/05-01/13-2145-Conf-Corr ('Arido Document in Support of Appeal').
[3] Arido Document in support of Appeal, para. 474.
[4] ICC-01/05-01/13-2123-Corr ('Sentencing Decision'), para. 97.

the violations of fundamental human rights, makes a finding that there has been a grave and manifest miscarriage of justice. Notwithstanding, the Defence preserves its right to seek compensation for the violation of Appellant's fundamental human rights with the Presidency pursuant to Article 85(1) and (3) of the Statute and Rule 173(2)(a) and (c) of the Rules of Procedure and Evidence ('RPE').

II. STANDARD OF REVIEW

6. Article 83(2) defines that, in relation to an appeal against a sentencing decision, the Appeals Chamber's primary task is to review whether the Trial Chamber made any errors in sentencing the Appellant.[5]

7. Firstly, the Appeals Chamber may (a) reverse or amend the sentence, or (b) order a new trial, if it finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence,[6] or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error.[7]

8. The material effect of such errors is only established if the Trial Chamber's exercise of discretion led to a disproportionate sentence.[8] In this regard, the Defence avers that clearly any length of a sentence is disproportionate if the Appeals Chamber sets aside the conviction as a whole.

9. The Chamber's failure to consider mandatory factors listed in Rule 145(1) of the RPE can amount to an error of law, an error of fact, or an unreasonable sentence as to constitute an abuse of discretion.[9] The Defence submits that in assessing such errors, the Appeals Chamber

[5] ICC-01/04-01/06-3122 ('Lubanga SAJ'), paras 2, 39.
[6] *See* Situation in the Democratic Republic of the Congo (ICC-01/04), Separate and partly dissenting opinion of Judge Georghious M. Pikis, 13 July 2006, para. 23: '[u]ltimately, the grounds upon which a decision on admissibility can be impugned are no different from those enumerated in article 81(1)(a) of the Statute. To these grounds one must necessarily add those affecting a fair trial that should pervade the judicial process as mandated by Article 21(3) of the Statute; *see also* Annex B: William A. Schabas, The International Criminal Court: A Commentary on the Rome Statute, Oxford University Press, 2010, p. 953.
[7] Lubanga SAJ, paras 2, 3, 4, 39, 45.
[8] *Ibid.*, para. 4.
[9] *Ibid.*, paras 41, 42, 43 (referring to Kony Admissibility Appeal Decision, para. 80). *See also* Lubanga SAJ, para. 44 (reaffirming that the Appeals Chamber's review in such circumstances will be deferential, intervening only if (i) the Trial Chamber's exercise of discretion is based on an erroneous interpretation of the law; (ii) the discretion was exercised based on an incorrect conclusion of fact; or (iii) as a result of the Trial Chamber's weighing and balancing of the relevant factors, the imposed sentence is so unreasonable as to constitute an abuse of discretion).

should not defer to the Chamber's interpretation but instead should reach its own conclusions as to whether or not the Chamber's interpretation was correct.[10]

10. Secondly, the Appellant may appeal a sentence on the basis of "disproportion between the crime and the sentence" under Article 81(2). To exercise its discretion properly, the Trial Chamber must weigh and balance all relevant factors[11] and enter a sentence that is proportionate to the offence and that reflects the totality of the culpability of the Appellant.[12]

11. The Defence also notes that given that a decision on sentence is appealed only by the person convicted – as in the present case – it cannot be amended to the convicted person's detriment.[13] In other words, the present appeal of sentence by the Appellant cannot result in an increase in the sentence imposed by the Trial Chamber.

12. Finally, the above-outlined standard of review is similar to the standard of review applied by the *ad-hoc* tribunals.[14]

III. FIRST GROUND: APPELLANT'S 11 MONTHS SENTENCE SHOULD BE FOUND NULL AND VOID

A. The Trial Chamber received evidence at the sentencing stage which if available during trial, would have affected the outcome of the case by rendering the conviction nugatory and the sentencing unnecessary

1. The sentence was decided upon following an error of procedural law

13. D-4 was the Prosecution witness (P-256) at the Sentencing Hearing.[15] As discussed in the Arido Defence Document in Support of Appeal,[16] D-4's testimony was found to be reliable.[17]

[10] *See* ICC-01/04-02/12-271 ('Ngudjolo AJ'), para. 20; *see also* ICC-01/04-01/06-3121-Red ('Lubanga AJ'), para. 18; ICC-02/04-01/15-251 ('Ongwen IDAC Appeal Decision'), para. 30.
[11] *See* Rule 145(1) of the RPE.
[12] Lubanga SAJ, paras, 1, 40.
[13] *See* Article 83(2) of the Statute; *see also* Annex B: William A. Schabas, The International Criminal Court: A Commentary on the Rome Statute, Oxford University Press, 2010, p. 952.
[14] *See Blagojević and Jokić* Appeal Judgment, para. 321; *see also Dordević* Appeal Judgment, para. 932; *Strugar* Appeal Judgment, para. 336; *Deronjić* Sentencing Appeal Judgment, para. 8; *Babić* Sentencing Appeal Judgement, para. 7; *Nikolić* Sentencing Appeal Judgment, para. 9; *Delalić* Appeal Judgment, paras 716-717; *Ndindiliyimana* Appeal Judgment, para. 418; *Nahimana* Appeal Judgment, para. 1037; *Kayishema and Ruzindara* Appeal Judgment, para. 320; *Musema* Appeal Judgment, para. 15.
[15] The Defence objected to calling of D-4 at the hearing (see ICC-01/05-01/13-2029-Conf and ICC-01/05-01/13-2059). The Trial Chamber decided that either D-4 should appear for cross-examination or be withdrawn by the Prosecution. Decision on Sentencing Witnesses and Setting an Article 76(2) Hearing, 11 November 2016, para. 16 ("[…] procedural fairness demands that the Prosecution Witness also appear to be examined by the other parties. If the Prosecution does not wish to expose this witness to such an examination, then it must withdraw him. The anticipated testimony summary raises serious allegations, and the Arido Defence in particular should be afforded an opportunity to challenge them").
[16] Arido Document in Support of Appeal, paras 403 to 428.

The Trial Chamber also noted "a degree of vagueness in some of the responses of the witness that were not, however, further clarified during his testimony". Nevertheless, elements of D-4's testimony directly contradicted key elements on which the Appellant's conviction was based, creating reasonable doubt.

14. The bifurcated procedure[18] for conviction and sentencing at the ICC means that this testimony impacts upon both the legality of the conviction and thus in turn the sentence. The assessment of D-4's evidence materially contradicts the conviction and this fundamentally undermines the sentencing decision which was created in reference to the Judgment but subjected to new testimony that was not part of the record at the time of the Judgment. Had that resulted in an acquittal, the sentence would have been materially different or non-existent. To proceed to issue a sentence in those circumstances was an error of procedural law and led to a fundamentally flawed sentence. As the Trial Chamber did not revisit the conviction, the Appellant submits that this was an error of law which the Appeals Chamber must consider and correct.

2. Four elements of D-4's testimony refute or undermine the basis of the conviction.

15. These are (1) that Mr Arido instructed D-4 to present himself as a soldier; (2) that Mr Arido assigned D-4 a rank; (3); that D-2 and D-3 were not soldiers; and (4) D-4's recruitment by Mr Arido.

16. Firstly, the Trial Chamber found the Mr Arido instructed D-4 to present himself as a soldier to Me. Kilolo.[19] This finding is an important foundation in the Trial Chamber's conclusion that Mr Arido corruptly influenced the four witnesses including D-4. Yet, the sentencing hearing provides another narrative which refutes the Trial Chamber's conclusion that the Appellant instructed D-4 to present himself as a solder.

17. D-4 provided an explanation[20] for the circumstances surrounding an attestation[21] submitted by the Arido Defence. D-4 clearly stated that he did not forge the attestation in the context of his interaction with the Appellant or his Defence. Instead, D-4 testified he forged the document

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[17] Sentencing Decision, para. 81.
[18] Arido Document in Support of Appeal, para. 408.
[19] Trial Judgment, paras 128, 130, 340, 420, and 669.
[20] ICC-01/05-01/13-T-53-CONF-ENG, pp. 28-29.
[21] CAR-OTP-0094-1886. D-4 explains this as the origin of CAR-D24-0003-0054.

and [REDACTED].[22] The document, prepared for other circumstances, stated that he was a [REDACTED].[23] In other words, his explanation indicates that he held himself as a soldier in a forum unconnected to the Bemba Main case, Douala meeting, the supposed coaching by Mr Arido, and Article 70 proceedings. It is relevant that he stated that already did so before [REDACTED] to establish proof of his military status.

18. This is evidence that D-4 was holding himself out to be a soldier, if not also evidence that D-4 was a military person, and should be seen in light of the statement provided to the Arido Defence D-4 where he also held himself out to be a soldier. He stated therein "[REDACTED]"[24] and explains his promotions further in the statement.[25]

19. Thus, his testimony raises reasonable doubts as to whether Mr Arido instructed D-4 to present himself as a soldier and instructed him on how to present himself as a soldier. This is because from the testimony it appears that D-4 (a) carried himself as a soldier; (b) may have had a knowledge of military affairs, terminology, and so on, to substantiate this persona; and (c) may in fact have been a soldier.

20. Further undermining the Trial Chamber's assessment of facts, when the Defence submitted the attestation for admission at trial to prove the Military status of D-4, the Chamber rejected it.[26] It must be recalled that the Trial Chamber analysed the document thus:

> The third item is a handwritten attestation, dated 10 May 2013, which purports to demonstrate the military background of D-4. Although the Arido Defence does not explain the origins of this note, the Chamber is satisfied from its date and formal tone (despite being handwritten) that this letter was written in the author's capacity as a witness in the context of the Main Case proceedings.[27]

21. D-4's testimony contradicted this finding as according to D-4 it was he who created the document and not [REDACTED]. The testimony increased its probative value that D-4 held himself out as a soldier. During sentencing, the Prosecutor submitted the document and it was accepted.[28] This suggests that the Trial Chamber accepted the explanation for the document.[29]

[22] ICC-01/05-01/13-T-53-CONF-ENG, p. 28, ll. 7-22.
[23] CAR-OTP-0094-1886.
[24] CAR-D24-0006-0004.
[25] *Ibid.* at 0006.
[26] ICC-01/05-01/13-1858, para. 31.
[27] *Ibid.*
[28] ICC-01/05-01/13-1990 and ICC-01/05-01/13-2099.
[29] ICC-01/05-01/13-2099, para. 8 *citing* ICC-01/05-01/13-T-53-CONF-ENG, page 4 lines 1-9.

22. Secondly, the Trial Chamber found that Mr Arido attributed a rank in the military to D-4 and the other three witnesses.[30] However, the evidence of D-4 contradicts the trial findings. A document[31] was provided by D-4 to the Arido Defence by which D-4 sought to establish his Military status as claimed in his statement to the Defence. This document contained a list of individuals, their origin, and ranks. This list included the name of D-2.

23. In discussing the [REDACTED] D-4 provided the following answers:

> [REDACTED]
>
> [REDACTED]
>
> [REDACTED]
>
> [REDACTED]
>
> [REDACTED]
>
> [REDACTED]
>
> [REDACTED]
>
> [REDACTED].[32]

24. This interaction indicates two things: (a) it corroborates the conclusion that D-4 self-assigned his rank [REDACTED]; and (b) he appears to have assigned a rank to D-2 or D-2 had already assigned himself a rank.

25. Lead Counsel Chief Taku stated this fact in his sentencing submissions before the Chamber and neither the Prosecutor nor the Chamber contradicted him.[33]

26. A further implication of D-4's account of the [REDACTED]document is that it suggests that D-4 has a military background. This is demonstrated by (a) his possession of the list itself; (b) his knowledge that [REDACTED]is the leader of that rebellion;[34] and (c) seeming knowledge of where the group operates.[35]

[30] Trial Judgment, paras 130, 141, 338, 420, 669, and 671.
[31] CAR-D24-0002-0003.
[32] ICC-01/05-01/13-T-53-CONF-ENG, p. 26, l. 11 to p. 27, l. 12 (emphasis added).
[33] ICC-01/05-01/13-T-55-CONF-ENG, pp. 21-22.
[34] ICC-01/05-01/13-T-53-CONF-ENG, p. 51, ll. 10-11.
[35] *Ibid.*, p. 43.

27. Thirdly, D-4's testimony hints at a further contradiction to the Judgment. In examination-in-chief D-4 responded thus:

> [REDACTED]
>
> [REDACTED][36]

28. In the context of other information such as D-6's [REDACTED][37] and other evidence raised in respect to D-2 and D-3's credibility[38] this exchange should give pause for thought as to why – if all three witnesses were in on the purported charade – why D-2 and D-3 would introduce themselves as soldiers?

29. Finally, in the Judgment, the Trial Chamber found that Mr Arido recruited witness D-4.[39] In the sentencing hearing; however, D-4 stated that he was [REDACTED]. In this regard, his statement to the Prosecution – which the Trial Chamber relied upon stated:

[36] ICC-01/05-01/13-T-55-CONF-ENG, pp. 22, l. 24 to p. 23 l. 7.
[37] Arido Document in Support of Appeal, paras 321, and 326 to 332.
[38] *Ibid.*, paras 273 to 293.
[39] Trial Judgment, paras 112, 334, 420, and 669.

[REDACTED]

[REDACTED] [40]

30. Thus, D-4 provided evidence of proximity [REDACTED]. Kokaté was the initiator of the alleged mission conferred on Mr Arido.[41] This D-4 evidence, if available to a reasonable trier of fact, would have raised reasonable doubt about the allegation of Mr Arido recruiting D-4 and coaching him on activities that in the normal course of events are part of D-4's duties to [REDACTED].

3. Conclusion

31. Despite these four factors in evidence, the Sentencing Decision repeats its finding that "[Mr Arido] assigned various military ranks and handed out military insignia to each of the witnesses."[42]

32. The Trial Chamber had before it evidence that was not available at trial. The contradictions were brought to the attention of the Trial Chamber during sentencing closing arguments.[43] At the time of the Decision it – the trier of fact – was still seized of the matter and should have re-considered the Judgment. However, the Appeals Chamber has the power to review the issue. The issue for appeal is: if compelling evidence arrives at a time that could have impacted upon the conviction – does the Trial Chamber have the power to vacate the Judgment itself? The Appellant submits that it does.

33. By failing to provide a reasoned opinion on this issue when it was raised, the Trial Chamber deprived the Appellant of the right to seek appellate review and this constitutes a discernible error of fact and law warranting appellate intervention.

B. The Trial Chamber erred in failing to take into account and give any weight to violations of the Appellant's fundamental human rights

[40] CAR-OTP-0094-1781, at 1785, ll. 113 to 117.
[41] *See* Arido Document in Support of Appeal, paras 82-87 and in particular footnote 69 in para. 84 *citing* Trial Judgment references to Kokaté and Appellant: paras 125, 131, 320, 323, 326-327, 331, 334, 339, 341-342, 344, 430, and 716.
[42] Sentencing Decision, para. 75.
[43] ICC-01/05-01/13-T-55-CONF-ENG, pp. 21-23. *See particularly*: "Your Honours, the Arido Defence has submitted that most answers provided by this witness undermine the findings of the Court" on p. 22, ll. 17-18.

34. In the Sentencing Decision, the Chamber is silent on all human rights violations raised by the Arido Defence in its Sentencing Submissions.[44] The Chamber's failure to take into account and give any weight to a series of violations of fundamental human rights resulted in unfair proceedings that ultimately affected the reliability of the Sentencing Decision. As a consequence, individually or in combination with other errors, the sentence of 11 months imposed upon Appellant should be vacated.

35. In regard to (un) fair proceedings, the ICC Appeals Chamber has defined the term 'fair' as being associated with the norms of fair trial and corresponding human rights, as per Article 64(2) and Article 67(1) of the Statute.[45] The Arido Defence was thorough in pointing to the unfairness of the 'Article 70' case proceedings and requesting the Trial Chamber to consider multiple human rights violations suffered by Appellant and his family prior and during the trial.[46]

36. In particular, the Arido Defence has repeatedly raised the following violations:

a. The threats and assault on a family member that Mr Arido's unjust imprisonment exacerbated;[47]

b. The Prosecution's overly broad, and illegal[48] Western Union investigations carried out without judicial authorization;[49]

c. Serious violations of Appellant's and his family's internationally recognized right to privacy;[50]

d. The Prosecution's failure to correct the harmful characterization of Appellant as a [REDACTED], and the Chamber's failure to avoid its on-going adverse consequences;[51]

[44] ICC-01/05-01/13-2086-Conf-Corr ('Arido Sentencing Submissions'), paras 88-95.
[45] *See* Situation in the Democratic Republic of the Congo: ICC-01/04-168, para. 11.
[46] *See* ICC-01/05-01/13-1904-Conf, paras 382-406; *see also* Arido Document in Support of Appeal, paras 80, 81, 95-102, 116-122, 125-130, 131-149, and pp. 101-104.
[47] *See* CAR-D24-0003-0034; *see also* ICC-01/05-01/13-T-46-ENG ET, p. 18; Sentencing Decision, para. 90
[48] ICC-01/05-01/13-1948, paras 28, 36, and pp. 101-104.
[49] Arido Document in Support of Appeal, paras 80, 81, 95-102, 125-130, 137-149, and pp. 101-104.
[50] *Ibid.*, paras 80, 95-102, 125-130, 131-136, 137-149, and pp. 101-104; *see also* ICC-01/05-01/13-1948, para. 28;
[51] Arido Document in Support of Appeal, paras 80, 95-102, 137-149, and pp. 101-104.

e. The Prosecution's selective and late disclosures of Call Data Records and related materials;[52]

37. In light of the above, the Arido Defence requests that the Appeals Chamber acknowledges that the above-listed human rights violations led to a grave and manifest miscarriage of justice, and thus, sets aside and reverses the Chamber's conviction and sentence, and enters a verdict of acquittal.[53]

IV. SECOND GROUND: THE SENTENCING DECISION CONTAINS LEGAL AND FACTUAL ERRORS THAT MATERIALLY AFFECTED THE TRIAL CHAMBER'S EXERCISE OF DISCRETION

A. The Trial Chamber's consideration of the gravity of Article 70(1)(c) offences failed to individualise the sentence in violation of the Rome Statute

38. While the "inherent gravity" discussed by the Trial Chamber in the Judgment[54] does not stem from the legal texts, however, having not carefully individualised this factor in the Sentencing Decision, the Trial Chamber's blanket approach effectively applied a kind of mandatory minimum sentence. The danger of this sentencing approach, when based on imposed legal texts, is well summarised by the Majority of the Canadian Supreme Court in *R. v. Nur* when it rejected a statutory imposed minimum sentence related to possession of an illegal firearm. It stated:

> Mandatory minimum sentences, by their very nature, have the potential to depart from the principle of proportionality in sentencing. They emphasize denunciation, general deterrence and retribution at the expense of what is a fit sentence for the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime. They function as a blunt instrument that may deprive courts of the ability to tailor proportionate sentences at the lower end of a sentencing range. They may, in extreme cases, impose unjust sentences, because they shift the focus from the offender during the sentencing process in a way that violates the principle of proportionality. They modify the general process of sentencing which relies on the review of all relevant factors in order to reach a proportionate result. They affect the outcome of the sentence by changing the normal judicial process of sentencing.[55]

39. The Trial Chamber failed to individualise its assessment of the "inherent gravity" as required by Article 78(1)[56] and Rule 145(1)(a)[57] read in conjunction. In the legal discussion of the

[52] *Ibid.*, paras 116-122;
[53] *Ibid.*, para. 474.
[54] Trial Judgment, para. 15.
[55] *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, para. 44.
[56] "In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as [...] *the individual circumstances* of *the convicted person*." (emphasis added)

Judgment, the Trial Chamber recalled a prior decision whereby it found that Article 70(1)(a) to (c) offences include an "inherent gravity". It re-stated:

> [T]he Chamber considers that for a court of law, there is an intrinsic gravity to conducts that, if established, may amount to the conducts that are certainly never in the "interest of justice", and hardly will it ever be so to tolerate them. For they potentially undermine the very efficacy and efficiency of the rule of law and of the courts entrusted to administer it.[58]

40. Given its placement in the general law section, the above finding applies to all charges and all those convicted.

41. This "inherent gravity", which the Trial Chamber states is part of the conviction, also formed part of the Sentencing Decision.

42. The Trial Chamber stated that "[n]ot all offences forming the grounds for conviction are necessarily of equivalent gravity and the Chamber must weigh each of them",[59] yet there is little to no indication that the Trial Chamber made any distinctions between the temporally short and geographically limited conduct forming Mr Arido's conviction and the other individuals convicted. There also is no indication that the relatively more limited role confirmed by the Pre-Trial Chamber was taking into account.[60]

43. If anything, the Trial Chamber sought to elevate Mr Arido's conduct up to the same level as those involved in the common-plan. It emphasised his "particular insistence over two days in Douala"[61] and during that time he "did not miss any opportunity to coach the four witnesses concerned."[62] Contradicting the Judgment's own discussion of Mr Kokaté's role,[63] it noted "Mr Arido executed the offences on his own initiative".[64]

44. With respects to the present sentence, the Trial Chamber appears to have sought to bring the gravity of Mr Arido's offences up to the level of the others convicted, as grave-by-association, rather than seek to individualise and contextualise the sentence.

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[57] "Bear in mind that the totality of any sentence of imprisonment and fine, as the case may be, imposed under article 77 *must reflect the culpability* of *the convicted person*." (emphasis added)
[58] Trial Judgment, para. 15.
[59] Sentencing Decision, para. 23.
[60] CoC, para. 52.
[61] Sentencing Decision, para. 75.
[62] *Ibid.*
[63] The further legal implications and citations are raised in Arido Document in Support of Appeal, paras 82-87.
[64] Sentencing Decision, para. 75.

45. In conclusion, whether there is an inherent gravity to interference with the court's process, that gravity must still be individualised. In not individualising the gravity of the sentence, the Trial Chamber has impermissibly placed Mr Arido's conduct at the same level as those of the other sentenced in the same decision. The harm is that the failure to distinguish the various sentences has resulted in an inflated sentence.

B. The Trial Chamber abused its discretion by considering an aggravating factor – damage – within its gravity assessment

46. The inclusion of damage within the assessment of gravity is a legal error whereby the Trial Chamber sought to increase Mr Arido's sentence when the Trial Chamber was precluded from doing so by its finding in the Judgment that Article 70(1)(c) was a crime of conduct.

1. The Trial Chamber was precluded from considering damage in the gravity assessment due to findings in the Trial Judgment

47. It is worth reiterating the conduct finding in the Judgment concerning the *actus reus*:

> [Article 70(1)(c)] penalises the improper conduct of the perpetrator who intends to influence the evidence before the Court and does not require proof that the conduct had an actual effect on the witness. It is not required for this offence that the criminal conduct actually influences the witness in question – the offence can be complete even if the witness refuses to be influenced by the conduct in question. This is so because the provision penalises the conduct of the physical perpetrator who, from his or her vantage point, seeks to manipulate the evidence given by the witness. Whether the witness met the perpetrator's intentions is irrelevant in this regard. [...][65]

48. In contrast to the Judgment, in the discussion of gravity, the Sentencing Decision focused upon the false testimony of the four witnesses related to the impugned conduct for which Mr Arido was convicted.[66] While not explicitly referenced, the only reasonable conclusion that can be drawn is that the Trial Chamber was applying the factor of "the extent of the damage caused" pursuant to Rule 145(1)(c).[67] Damage is a *result* caused by conduct.

[65] Trial Judgment, para. 48.
[66] Sentencing Decision, para. 73.
[67] The Defence notes that, as argued in the Arido Defence Document in Support of Appeal, the evidence for these conclusions is not proof beyond a reasonable doubt due in part to missing witnesses and D-2 and D-3's legal status as accomplice/perpetrators, which rendered their evidence incredible and unreliable.

49. Even as recognised by the Trial Chamber in its sentence,[68] damage is not part of the *actus reus* for which Mr Arido was convicted.[69] Thus, the Trial Chamber went beyond the required elements of the offence, and thus the permissible assessment of the gravity of offence for which it convicted Mr Arido. Because the Trial Chamber found that 70(1)(c) was an offence of conduct, it was not open to the Trial Chamber to consider results under the gravity of the offence – the result was not what he was convicted for.

2. The consideration of damage within the assessment of the gravity of the offence impermissibly lowered the standard of proof for aggravating factors

50. The only – legally contestable – option available to the Trial Chamber was to declare the damage an aggravating circumstance as this additional element went beyond the conviction entered. Yet the Trial Chamber stated that "[i]t [...] found no aggravating [...] circumstances" for the Appellant.[70] Such a finding was consistent with the Defence submission that there were no aggravating circumstances with regards to Mr Arido's conviction.[71]

51. As noted by the Trial Chamber, the standard of proof for an aggravating factor is proof beyond a reasonable doubt.[72] The Trial Chamber was precluded from finding damage as an aggravating factor, presumably, for reasons described in the next argument – in short, the reason is that Mr Arido causing the damage of false testimony is directly contradicted by findings in the Judgment.

52. Being unable to rely upon damage as an aggravating factor the Trial Chamber sought to rely upon it anyway by impermissibly disguising this unproven and unestablished factor within its purported assessment of gravity as a kind of impermissible partially aggravating one.

3. Conclusion

53. The discussion of harm forms an important part of the Trial Chamber's discussion of gravity. To assess a factor that cannot be considered within the gravity assessment is a legal error. Like a distant cousin to the prohibition against double counting, the legal error exaggerated

[68] Sentencing Decision, para. 73 ("[...] Even though the Chamber does not require a causal link between the illicit coaching of witnesses and their actual testimony [...]") *citing* its finding in para. 48 of the Trial Judgment that Article 70(1)(c) is an offence of conduct.
[69] The Defence notes that even with respect to conduct, both the intent and knowledge have been challenged in the Arido Document in Support of Appeal, *see particularly* paras 367-398 and 454-460.
[70] Sentencing Decision, para. 96.
[71] Arido Sentencing Submissions, paras 99-109.
[72] Sentencing Decision, para. 25.

the seriousness of the offence upon which the Trial Chamber started in its assessment of how to sentence Mr Arido and this ultimately led to an inflated sentence.

54. Finding no aggravating factors and yet applying one is at best a contradiction in reasoning that constitutes an error of legal reasoning. Basing a sentence upon an unproven aggravating circumstance is a legal error, is unfair, and is "unreasonable as to constitute an abuse of discretion".[73]

55. Whether characterised as a legal error or an abuse of discretion, the disguising of a factor within the assessment of gravity materially affected the Sentencing Decision. To impose a sentence in this way is a miscarriage of justice that requires Appeals Chamber consideration and ultimately rejection of the ill-founded sentence.

C. In the alternative, the Chamber improperly assessed the gravity of the offence by making the factual error of attributing damage caused by others to Mr Arido

56. In considering the purported damage as a causal result of Mr Arido's actions, the Trial Chamber made two related yet manifest errors. First, it fundamentally mis-assessed the source of the damage. The Trial Chamber attributed Me. Kilolo's acts to Mr Arido in contradiction of its own Judgment findings. Secondly, in the mis-attribution it thereby incorrectly inflated the gravity of the offence which led to the Trial Chamber incorrectly inflating the sentence imposed.

57. Prominent in its assessment of the gravity of the Mr Arido's offence the Trial Chamber discussed Mr Arido's causal contribution to false testimony. It stated:

> Even though the Chamber *does not require a causal link* between the illicit coaching of witnesses and their actual testimony, it is *nevertheless attentive to the fact that the witnesses coached by Mr Arido subsequently testified falsely in the Main Case*. Specifically, (i) D-2 testified falsely regarding payments, his acquaintance with other individuals and the nature and number of prior contacts with the Main Case Defence; (ii) D-3 testified falsely regarding payments and his acquaintance with other individuals; (iii) D-4 testified falsely regarding his acquaintance with other individuals; and (iv) D-6 testified falsely regarding payments, the nature and number of prior contacts with the Main Case Defence and his acquaintance with other individuals. [...][74]

[73] Lubanga SAJ, para. 44.
[74] Sentencing Decision, para. 73 (emphasis added).

58. It concluded that "The Chamber considers this to be relevant in its assessment of the gravity of the offences".[75] Thus, the Trial Chamber considered a contribution by Mr Arido to the ultimate false testimony before Trial Chamber III as a relevant factor in its assessment of gravity.

59. Mr Arido did not cause the harm or damage that it considered relevant to its assessment of gravity. This was not found. In fact, the Trial Chamber explicitly rejected a link between the acts of Mr Arido and the false testimony. It stated:

> On the evidence, ***there is no link between Mr Arido's conduct and the false testimony*** the witnesses provided on contacts, payments and association with third persons. The Chamber is therefore unable to conclude that Mr Arido aided or abetted or otherwise assisted the giving of false testimony.[76]

60. It also stated:

> "Having analysed the evidence, as set out in Sections IV.B to IV.C, the Chamber found that the falsity of the evidence of witnesses D-2, D-3, D-4 and D-6 for the purpose of Article 70(1)(b) of the Statute, in the specific circumstances of this case, can relate only to (i) prior contacts with the defence in the Main Case; (ii) the receipt of money, material benefits and non-monetary promises; and (iii) the witnesses' acquaintance with third persons. ***The evidence did not show that Mr Arido instructed the four witnesses on any of these points.***"[77]

61. Thus, the Sentencing Decision assesses the gravity of the offence on a basis that contradicts the Judgment findings. In doing so, the Sentencing Decision is an exercise of discretion based upon "a patently incorrect conclusion of fact"[78] which rises past the threshold required by the jurisprudence for Appeals Chamber intervention.

62. In addition, the four instances of false testimony that the Trial Chamber cited in paragraph 73 of the Sentencing Decision are explicitly attributed to the acts of Mr Kilolo in the Judgment. These are:

[75] *Ibid.*
[76] Trial Judgment, para. 872.
[77] *Ibid.*, para. 947.
[78] Lubanga SAJ, para. 41.

a. With regards to D-2, the Trial Chamber attributed the false testimony concerning payments,[79] acquaintances, and nature and number of prior contacts to the instructions of Mr Kilolo to the witnesses.[80]

b. Similarly as regards D-3, the Trial Chamber also attributed the false testimony regarding payments[81] and acquaintances with other individuals with the instructions of Mr Kilolo.[82]

c. Notwithstanding that in the appeal against conviction the Appellant has challenged the findings regarding D-4 and D-6 on the basis that these individuals were missing witnesses,[83] the Trial Chamber attributes D-4's false testimony regarding his acquaintance with other individuals[84] and D-6's false testimony regarding payments,[85] the nature and number of prior contacts with the Main Case Defence and his acquaintance with other individuals[86] to the instructions of Mr Kilolo.

63. Furthermore, in paragraph 342 of the Judgment, the Trial Chamber described how Mr Kokaté joined the meeting in Douala. According to the Judgment, the witnesses, who were doubting and threatening to leave, were assured by Mr Kokaté's promises.[87] The narrative provided by the Trial Chamber makes clear that it was Mr Kokaté and not Mr Arido who had the capacity, power, gravitas, or influence to assure the witnesses gathered and thereby give them a reason to stay in contact with the Bemba Defence. On the findings of the Judgment, it was first Mr Kokaté's intervention that secured the continuing engagement of the assembled witnesses.

64. In sum, in the Judgment the Trial Chamber found that Mr Kilolo caused the harm for which it considered contributed to the heightened gravity of Mr Arido's offences. This is a clear error of fact in its assessment of the factual underpinning of Mr Arido's offences. The attribution of

[79] Trial Judgment, paras 360 and 366.
[80] *Ibid.*, para. 360 and 366.
[81] *Ibid.*, para. 366.
[82] *Ibid.*, paras 363, 360, and 366.
[83] *See* Arido Document in Support of Appeal, paras 311 to 325.
[84] Trial Judgment, para. 360.
[85] *Ibid.*, para. 366.
[86] *Ibid.*, paras 366.
[87] *Ibid.*, para. 342 ("P-260 (D-2) further testified that, after Mr Kokaté joined the meeting, the witnesses raised the issue of payment and possible relocation to Europe. P-260 (D-2) clarified that Mr Kokaté repeated Mr Arido's promise that each witness would receive money shortly before the testimony and be able to go to Europe in exchange for their Main Case testimony. P-245 (D-3) also added, without prompting, that he became overwhelmed by the anticipated risk and threatened to withdraw unless the witnesses were paid. D-3's intervention provoked a swift and angry reaction from Mr Kokaté, who, in turn, threatened to recruit other witnesses to do the job.")

this false testimony is a major component of the Trial Chamber's reasoning regarding the gravity of the offence. As the sentence of 11 months proceeds on the premise that the damage caused by Mr Arido is a major component of the gravity of the offence, the resulting sentence is founded on a manifest error.

D. The Trial Chamber erred by failing to find any mitigating circumstances

65. The Trial Chamber's ruling that it has found no mitigating circumstances in this case[88] is fundamentally flawed.

66. The ICC legal framework is not exceptional. It exists within a context of prior international jurisprudence, and, perhaps more importantly, national criminal jurisdictions that have recognised certain mitigating factors.[89] In jettisoning any mitigating factors in the present case, the Trial Chamber has departed from the obligation to apply "principles and rules of international law" pursuant to Article 21(1)(b) and "principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime" pursuant to Article 21(1)(c) and committed a legal error that materially affected the Sentencing Decision.

67. In its Sentencing Decision, the Trial Chamber distinguished between Article 5 'crimes' and Article 70 'offences'. When determining the appropriate sentence, the Chamber noted that Article 70 'offences' are by no means as grave as Article 5 'crimes'.[90] Yet, when considering the factors in mitigation, the Chamber has failed to apply this same conceptual distinction between Article 5 'crimes' and Article 70 'offences'.

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[88] Sentencing Decision, para. 96.

[89] *See* for example Articles 61-62 of the Italian Criminal Code; Articles 21-22 of the Spanish Criminal Code; Cf §46 para 2 of the German Criminal Code; and §4 'Criminal history and criminal livelihood' of the USSC, Guidelines Manual, 1 November 2016, pp. 392-395; §34(4) and 36 of the Slovak Criminal Code; *See further* Canada: Ontario Court of Appeal, *R. v. J.H.,* 1999 CanLII 3710 (ON CA), para. 22 ("The trial judge erred in principle in placing emphasis only on the objectives of deterrence and denunciation. A first sentence of imprisonment especially for a first offender should be as short as possible and tailored to the individual circumstances of the accused rather than solely for the purpose of general deterrence"); *R. v. Batisse*, 2009 ONCA 114 (CanLII), (For first time offenders, the principle of restraint "requires that the sentencing judge consider all sanctions apart from incarceration" and where necessary ensure the term be as "short as possible and tailored to the circumstances of the accused"); *see also* R. v. Hamilton, 2004 CanLII 5549 (ON CA), para. 96.

[90] Sentencing Decision, para. 32 (The Chamber held that the State Parties purposely distinguished between Article 5 'crimes' and Article 70 'offences'. It noted that Article 70 offences are by no means as grave as Article 5 crimes and applied this conceptual difference when determining the appropriate sentence.).

1. The Chamber erred in failing to accord any weight to Appellant's absence of prior convictions as a relevant mitigating factor

68. The Arido Defence, in its Sentencing Submissions, requested the Chamber to consider the Appellant's absence of a criminal record as a mitigating factor.[91] The Chamber, however, erred in dismissing the Appellant's absence of a prior conviction to be a factor in mitigation. In particular, the Chamber found that "the absence of prior convictions is a fairly common feature among individuals convicted by international tribunals and will not be counted as a relevant mitigating circumstance".[92]

69. The error lies in the Trial Chamber's failure to consider the *individual* circumstances of the Appellant's case[93] and failure to provide any reasoned opinion as to why the absence of a criminal record does not result in mitigation of the sentence in the present case. The Arido Defence seeks appeal of this legal error for the following reasons.

70. First, the Chamber's ruling disregards the conceptual difference between being convicted under Article 5 'crimes' and Article 70 'offences'. The Defence avers that Appellant's conviction under Article 70(1)(c) of the Statute is – in its nature and gravity – far closer to an ordinary domestic offence than mass-killing and torture or the responsibility of an army commander, thus it is relevant for the Chamber to look at Appellant's lack of prior criminal behaviour in this context.[94]

71. Nevertheless, even with regards to the core crimes of international criminal law, in *Kunarać* case, when addressing the absence of a criminal record, the Trial Chamber held that the "propensity to commit violations of international humanitarian law, or, possible crimes relevant to such violations" can be discerned only on the basis that a defendant might have a record of previous criminal conduct "relevant to those committed during the armed conflict" since "in practically all cases before the International Tribunal the convicted persons would be first time offenders in relation to international crimes".[95]

[91] Arido Sentencing Submissions, paras 2, 22.
[92] Sentencing Decision, para. 89.
[93] Article 78(1), Rome Statute; *see also* Articles 123-124, para 1 of the French Criminal Code (The article states that the Court shall impose penalties and establish rulings according to the circumstances of the offence and the personality of the accused.).
[94] Sentencing Decision, para. 32.
[95] *Kunarać* Trial Judgment, para. 843.

72. In this regard, the Arido Defence submits that a propensity to commit an offence which is in nature related to an offence under Article 70(1)(c) is in the Appellant's case more likely than to commit any of the crimes enumerated under Article 5 of the Statute. Despite the international codification of Article 70,[96] the offences contained therein comprise things such as bribery, corruption, dishonesty, and threats of violence. These are offences of ordinary life in a peaceful country in most parts of the world. In many states they are everyday experience however regrettable that may be.

73. Thus, unlike the unusual circumstance of being in a situation to choose to order a crime against humanity, the opportunity to commit Article 70-like crimes is frequent. Correspondingly, the absence of a prior conviction meaningfully shows a lack of propensity. Therefore, the Chamber erred in disregarding the individual or *sui generis* circumstances of the Appellant's case, and thus, not considering the absence of Appellant's prior conviction as a factor in mitigation.

74. Second, even if, *arguendo*, the Chamber's indiscriminate approach towards the nature and gravity of Article 5 'crimes' and Article 70 'offences' – in relation to factors in mitigation – is not considered, the Chamber's ruling concerning the absence of a prior conviction does not represent a practice consistent with national and international jurisdictions.

75. The Defence submits that a circumstance when an offender does not present previous criminal convictions is often considered a mitigating factor.[97] Generally, it is accepted that the Accused's prior criminal record can be of some influence in meting out the sentence and that a defendant with a clean criminal record should be regarded as relevant. This recognition also conforms with the Chamber's obligation to individualise the sentence.[98]

76. For example, the absence of previous criminal convictions was considered a mitigating factor in a number of cases before both the ICTY[99] and the ICTR.[100] Moreover, the US sentencing

[96] E.g. formal status as an international crime.
[97] *See* footnote 91 above.
[98] *Kunarać* AJ, para. 362 in which reference is made to Article 24(2) of the ICTY Statute.
[99] ICTY: *Aleksovski* Trial Judgment, para. 236; *Plavsić* Sentencing Judgment, para. 65; *Simić* Trial Judgment, paras 1089, 1100, 1113; *Nikolić* Sentencing Judgment, para. 265; *Kordić and Čerkez* Appeal Judgment, para. 1090; *Hadzihasanović and Kubura* Trial Judgment, paras 2080, 2089; *Zelenović* Sentencing Judgment, para. 55; *Mrksić* Trial Judgment, para. 701; *Rasim Delić* Trial Judgment, para. 585; *Milutinović* Trial Judgment, vol. 3, para. 1179; *Popović* Trial Judgment, para. 2156.
[100] ICTR: *Ruggiu* Trial Judgment, paras 59-60; *Rutaganira* Trial Judgment, paras 129-130; *Bisengimana* Trial Judgment, para. 165; *Serugendo* Sentencing Judgment, para. 65; *Nzabirinda* Sentencing Judgment, para. 108; *Rugambarara* Sentencing Judgment, para. 56.

process is likewise dependent on the assessment of the defendant's criminal history. In particular, a defendant's prior record is considered an important element in the process of individualisation of penalty.[101]

77. In sum, the Defence avers that the Chamber's approach towards Appellant's absence of prior criminal record is erroneous in failing to take into account Appellant's individual circumstances. This materially affected its discretion because it did not balance a factor that it should have considered. This thus, impacted upon the reliability of the Sentencing Decision. As a result, the sentence of 11 months imposed by the Chamber should be vacated.

2. The Chamber erred in failing to accord any weight to Appellant's family circumstances as a mitigating factor

78. The Chamber's refusal to accept the existence of any mitigating circumstances in Appellant's case is further shown to be erroneous by its failure to properly consider the relevance of this factor, and ultimately give any weight to Appellant's family circumstances in mitigation of his sentence.

79. In its Sentencing Decision, the Chamber found that 'family circumstances, in particular the impact on Mr Arido's family of his incarceration in a foreign country, are common to many convicted persons and cannot be taken into account in mitigation in the present case.'[102] Here, the Chamber fails to consider and give any weight to Appellant's individual and specific family circumstances. Instead, in order to achieve its preferred result, the Chamber generalizes the important relevance of Appellant's family circumstances by noting that such circumstances are common to many convicted persons.

80. In doing so, the Trial Chamber failed to explain its departure from prior jurisprudence or cite any jurisprudence in support of its position. Moreover, the ruling conflicts with prevailing international and regional approaches. As held by the ICTY Appeals Chamber in *Kunarać* case '[f]amily concerns should in principle be a mitigating factor.'[103] Due attention has been given to the 'family situation' of the defendant, particularly if married and with children. This circumstance was taken into account in numerous cases and considered as a mitigating factor

[101] For more detail *see*, §4 'Criminal history and criminal livelihood' of the USSG, Guidelines Manual, 1 November 2016, pp. 392-395.
[102] Sentencing Decision, para. 90.
[103] Kunarać AJ, para. 362.

by both *ad hoc* tribunals.[104] What is more, the fact of having young children or being the father of numerous children – as in the Appellant's case – was given mitigating weight in sentencing too.[105]

81. The rejection is also anomalous in light of the Trial Chamber's prior decision maintaining the liberty of the convicted persons pending sentencing. That decision placed emphasis on the established family lives of those convicted.[106] If family ties were relevant to maintaining liberty, it comes close to an inconsistency in approach to say that family ties would not be relevant to whether a sentence is necessary to fulfil the sentencing goals set out by the Trial Chamber.[107]

82. The rejection is further anomalous in light of the Arido Defence bringing Mr Arido's family circumstances [REDACTED].[108] [REDACTED]highlighted the individual circumstances of Mr Arido and his family and this should have been individualised by the Trial Chamber rather than dismissed as "common to many convicted persons".[109]

83. Having proper consideration of the requirement to "take into account [...] the individual circumstances of the convicted person",[110] and the fact that family circumstances are "in most cases" taken into account in the international and regional jurisprudence, the Chamber should have taken Appellant's family circumstances into account in mitigation of his sentence. Therefore, the Chamber's unsubstantiated dismissal of Appellant's family circumstances as a factor in mitigation of sentence amounts to a discernible error, which in combination with a series of other errors, materially affects the Chamber's exercise of discretion.

3. The Trial Chamber failed to accord any weight to three factors which increase the hardship of a sentence and should be given weight as factors mitigating sentence

[104] ICTY: *Aleksovski* Trial Judgment, para. 238; *Jelisić* Trial Judgment, para. 124; *Kunarać* Appeal Judgment, para. 362; *Vasiljević* Trial Judgment, para. 300; *Stakić* Trial Judgment, para. 923; *Banović* Sentencing Judgment, para. 82; *Babić* Sentencing Judgment, para. 89; *Brdjanin* Trial Judgment, para. 1130; *Blagojević and Jokić* Trial Judgment, para. 855; ICTR: *Muvunyi* Trial Judgment, para. 543; *Nzabirinda* Sentencing Judgment, paras 80-81; *Bagaragaza* Sentencing Judgment, para. 37; *Ntawukulilyayo* Trial Judgment, para. 476.
[105] *Erdemović* Sentencing Judgment, para. 16; *Serushago* Sentencing Judgment, para. 39; *Kunarać* Trial Judgment, paras 362, 408. *Elizaphan and Gerard Ntakirutimana* Trial Judgment, para. 896; *Bisengimana* Trial Judgment, paras 141, 144; *Tadić* Sentencing Judgment, *para. 26.*
[106] ICC-01/05-01/13-T-51-ENG, p. 33.
[107] Sentencing Decision, para. 19.
[108] [REDACTED].
[109] Sentencing Decision, para. 90.
[110] *See* Article 78(1), Rome Statute; *see also* Articles 123-124, para 1 of the French Criminal Code (The article states that the Court shall impose penalties and establish rulings according to the circumstances of the offence and the personality of the accused).

84. The Chamber erred in failing to consider and accord any weight to Appellant's incarceration in foreign countries, current unemployment and asylum application in France as a factor in mitigation of sentence.

85. In particular, the Trial Chamber completely ignored the relevance of Appellant's incarceration in foreign countries as an additional hardship of sentence.[111] The Chamber also refused to take into account in mitigation the Appellant's current unemployment and asylum application in France on the basis that these "are extraneous considerations to the present proceedings and are likely to change in the future."[112]

86. The dismissal of mitigating factors aimed at avoiding additional hardship of sentencing is at odds with international and national jurisprudence. Personal hardship has been taken into consideration in mitigation in *Darko Mrdja* case. That Trial Chamber considered the fact that the accused would serve his sentence in a foreign country, far from his family and relatives, as a relevant factor in 'determining the length of sentence.'[113] Furthermore, a German Supreme Court similarly considered as a sentencing factor the fact that a susceptibility to punishment is usually greater for foreigners having to serve time in a foreign country.[114]

87. The Defence recalls again that Mr Arido's sentence was served in pre-trial. Mr Arido served an 11 months sentence in a foreign country roughly 5,400 kilometres away from his family, making family visits impossible. Some of that time was in solitary confinement. At times [REDACTED].[115] It is submitted that these all aggravated the hardship of the sentence on the Appellant.[116]

88. It must be continually emphasised that the sentence occurred in the past and thus all that occurred must be understood to be part of the sentence imposed by the Trial Chamber. In this regard in *Hirst v. The UK*, the European Court on Human Rights held that "prisoners in

[111] Sentencing Decision, para. 90.
[112] *Ibid.*, para. 91.
[113] *Mrda* Sentencing Judgment, paras 105-109.
[114] *See* BGH St 43, 23, 234; *see also* §14.3 of the Recommendation CM/Rec(2012)12 of the Committee of Ministers to member States concerning foreign prisoners (It has adopted recommendations as to the treatment of foreign prisoners, based on their right to non-discrimination, to respect for cultural diversity, and to their linguistic needs); UNODC Handbook on prisoners with special needs, Criminal Justice Handbook Series, New York, 2009, pp. 79-98 (It found that 'foreign nationals are often disadvantaged in the criminal justice system due to increasingly punitive measures applied to foreign national offenders in many countries, to discrimination, limited awareness of legal rights, lack of access to legal counsel, lack of social networks and economic marginalization').
[115] ICC-01/05-01/13-579-Conf, p. 5.
[116] *See*, for example, *Mrda* Sentencing Judgment, paras 105-109; BGH St 43, 23, 234.

general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention, save for the right of liberty."[117] Therefore, given the Appellant's case, he and his family was denied to enjoy, *inter alia*, the right to family and had restricted access[118] to a lawyer.[119]

89. That denial is clearly in contradiction with Council of Europe's recommendation to its member states on the prison rules in Europe, which holds that "the arrangements for visits shall be such as to allow prisoners to maintain and develop family relationships in as normal a manner as possible"[120] and that "all necessary facilities shall be provided to assist untried prisoners to prepare their defence and to meet with their legal representatives."[121] This again is not the Appellant's case.

90. Last but not least, the Trial Chamber's explanation that the Appellant's employment and asylum situation "are likely to change" defies reason. Neither the Chamber nor any other party to the Article 70 case has provided any information as to the claim that Appellant's situation is likely to change in the future. Without more, the Trial Chamber's reason, especially given Mr Arido's refugee status is merely speculation and, it is submitted, should not form the basis for dismissing the additional harm of sentencing.

91. On the basis of the review of the Chamber's erroneous assessment of the Defence submissions as to the Appellant's personal hardship,[122] the Defence requests that the Appeals Chamber review this finding as part of the broader Defence request for a vacation of sentence.

4. The Chamber failed to explain its approach to distinguishing 'overall', 'individual', and 'mitigating' circumstances and thereby applied an incorrect legal standard of proof or exercised its discretion unreasonably

92. At present, the sentencing rules have only being discussed by the Appeals Chamber once at the ICC.[123] As is evident from that Judgment, the requirements of the sentencing rules at the ICC are subject to competing interpretations.[124]

[117] Case of *Hirst v. The United Kingdom* (No.2), ECtHR, No. 74025/01, Judgment, 6 October 2005, para. 69.
[118] Arido Sentencing Submissions, para. 50.
[119] *See Case of Płoski v. Poland*, No. 26761/95, 12 November 2002, Judgment, para. 30; Case of *Campbell and Fell v. The United Kingdom*, ECtHR, No. 7819/77, Judgment, 28 June 1984, para. 36; *Case of Golder v. The United Kingdom*, ECtHR, No. 4451/70, Judgment, 21 February 1975, paras 43-45.
[120] *See* §24.4 of the Recommendation Rec (2006) 2 of the Committee of Ministers to member states on the European Prison Rules.
[121] *See* §98.2 of the Recommendation Rec (2006) 2 of the Committee of Ministers to member states on the European Prison Rules.
[122] Arido Sentencing Submissions, paras 39-56.

93. It is clear that the Trial Chamber is obliged to consider whether there are mitigating factors in sentencing. Article 78(1) requires that the Trial Chamber shall consider "the gravity of the crime and the individual circumstances of the convicted person" "in accordance with the Rules of Procedure and Evidence". "As appropriate", the Trial Chamber is obliged to take in account an inexhaustive list of mitigating factors pursuant to Rule 145(2)(a) of the RPE.

94. Yet, as discussed above, the Trial Chamber severely restricted what could count as mitigating. Without discussion, the Trial Chamber rejected the Arido Defence characterisation of several factors as mitigating.[125] The Trial Chamber instead characterised these factors under the head of "overall circumstances"[126] yet placed them under a heading of "individual circumstances".[127]

95. "Circumstances"[128] is referred to in the sentencing rules as "individual circumstances" and other variations.[129] However, "overall circumstances" is not a legal term found within the rules or Statute.

96. The Trial Chamber explained its understanding of mitigating factors as "mitigating circumstances need not directly relate to the offence(s) and are, thus, not limited by the scope of the confirmed charges or the Judgment. They must, however, relate directly to the convicted person."[130]

97. Quite apart from the challenges above to the Trial Chamber's reasoning,[131] from this characterisation of mitigating factors, it is not clear why Mr Arido's good character[132] or individual circumstances that lead to the additional hardships of the sentence are excluded by the Trial Chamber as they are clearly and directly related to him. Moreover, what counts as

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[123] Lubanga SAJ.
[124] *Ibid.*, paras 32 to 50.
[125] ICC-01/05-01/13-2086-Conf , paras 22-56.
[126] Sentencing Decision, paras 88-92.
[127] *Ibid.*, p. 32.
[128] Article 71(1)(b) and Article 78(1), Rome Statute.
[129] Rule 145(1)(b) – "the circumstances"; Rule 145(1)(c) – "the circumstances of manner, time and location"; Rule 145(2)(a) – "Mitigating circumstances" and Rule 145(2)(a)(i) – "The circumstances falling short of constituting grounds for exclusion of criminal responsibility"; Rule 145(2)(b) – "Other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned."; and Rule 145(3) – "individual circumstances of the convicted person, as evidenced by the existence of one or more aggravating circumstances".
[130] Sentencing Decision, para. 24.
[131] *See* paras 69-73, 79, and 90.
[132] As illustrated through his lack of prior convictions, *see* paras 68-77 above.

mitigating within the rules goes beyond factors that mitigate the culpability of the individual such as "diminished mental capacity"[133] as the Rules provide that "conduct after the act"[134] should be considered. Thus an entirely restrictive interpretation is not supported by the rules and yet the Trial Chamber applied the rules in such a manner as to deny the mitigating nature of factors raised.

98. International human rights law requires the provision of a reasoned opinion.[135] The impact of this procession of un-articulated legal reasoning and conclusions is that it is impossible to know what standard of proof was applied or not applied. The requirement of providing a reasoned opinion provides a check on exercises of discretion to ensure that they are not taken on unfair, unreasonable, or plainly absurd bases amongst other prohibited reasons.

5. The Chamber erred in failing to provide any reasoned opinion as to the weight given to the 'Overall Circumstances' or their impact upon the sentence

99. Considering, *arguendo*, that the Trial Chamber was correct in its application of the legal standard to proof of mitigating circumstances, it erred in failing to provide any reasoned opinion as to what weight was given to the 'Overall Circumstances' and what was their ultimate impact upon the sentence imposed.

100. In addressing the elements that pertain to the 'Overall Circumstances' of Appellant, the Chamber has repeatedly ruled that they "will be taken into account when, ultimately, determining the appropriate sentence."[136]

101. Though a holistic reading of the decision indicates "individual circumstances" *probably* do not include factors that could increase sentence,[137] as a symptom of the incomplete reasoning,

[133] *See* Rule 145(2)(a)(i) of the RPE.
[134] *See* Rule 145(2)(a)(ii) of the RPE.
[135] *See inter alia*: ICC-01/04-02/12-271-Corr, para. 226; *Babić* Sentencing Appeal Judgment, para. 17; *Natelić & Martinović* Appeal Judgment, para. 603, 605; *Furundžija* Appeal Judgment, para. 69; *Kunarać et al.* Appeal Judgment, para. 41; *Tolimir* Appeal Judgment, para. 53; *Popović et al.* Appeal Judgment, para. 1387; *Stanisić & Simatović* Appeal Judgment, para. 78; UN Human Rights Committee (HRC), General Comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007, CCPR/C/GC/32, para. 29; *Hadjianastassiou v. Greece*, No. 12945/87, Judgment, 16 December 1992; Special Rapporteur on human rights and counter-terrorism, UN Doc. A/63/223 (2008) para. 15; *Garcia-Asto and Ramirez-Rojas v. Peru*, Inter-American Court (2005), para 155; *Wetsh'okonda Koso and Others v. Democratic Republic of the Congo* (281/2003), African Commission (2008), para. 89.
[136] Sentencing Decision, paras 88-92.
[137] Aggravating factors related to the commission of the offence, Sentencing Decision, para. 25, whereas individual circumstances "are not directly related to the offence committed" or culpable conduct; *see also* Sentencing Decision, para. 86.

the Trial Chamber did not even articulate clearly or explicitly the direction (e.g. increase/decrease) in which the factors considered in 'overall circumstances' would operate let alone the weight given.

102. The Appellant notes that it may not always be possible to assign an absolutely precise quantity to a specific factor across the many factual scenarios that can arise in sentencing; however, there is only one mention of the weight that the Trial Chamber might give a factor. It explained that "the allegations of an assault on a family member, even if accepted on a balance of probabilities, can only have a very limited weight".[138] Beyond this, all that is known about the Chamber's final reasoning is that:

> The Chamber has weighed and balanced all the factors as set out above. It has found no aggravating or mitigating circumstances and took into account Mr Arido's good behaviour throughout the trial, his personal situation, his peace, justice and reconciliation advocacy for the Central African Republic, his generosity towards compatriots and persons in need, the absence of prior convictions and family situation.[139]

103. Though it may be possible to presume that the Trial Chamber considers these factors as leading to a diminished sentence, the Chamber's impoverished reasoning offers a question as to what is the real impact? In light of the other identified legal issues regarding mitigation, the failure to explain the weight and impact upon sentence of "overall circumstances" constitutes an abuse of discretion that materially impacts upon the decision and merits Appeals Chamber scrutiny.

[138] Sentencing Decision, para. 90.
[139] *Ibid.*, para. 96.

V. REQUESTED RELIEF

104. In light of the above, the Arido Defence respectfully requests that the Appeals Chamber:

    a. set aside Appellant's conviction in whole, reverses the conviction and enters a judgment of acquittal; and

    b. render Appellant's sentence of 11 months imposed by the Chamber as null and void.

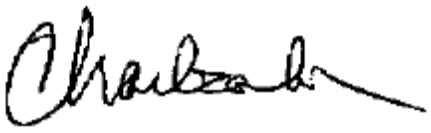
105. The above requested remedy is based on the legal, factual and procedural errors in the Trial Judgment, which are in violation of Appellant's fundamental human rights, including the right to a fair trial. These violations, individually and in aggregate, constitute a grave and manifest miscarriage of justice.

106. In the alternative, the Arido Defence respectfully requests that the Appeal Chamber provide a remedy which it deems fair and equitable.

107. In addition, the Defence requests that the Appeals Chamber declares Appellant's right to an effective compensation for a grave and manifest miscarriage of justice, pursuant to Article 85 of the Statute.

The Defence reserves the right to amend this brief.

Signed:



Chief Charles A. Taku, Lead Counsel

Dated this 31st Day of January 2018
The Hague, The Netherlands